Filed 10/14/20 In re N.T. CA6

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

In re N.T. et al., Persons Coming Under the Juvenile Court Law.	H047669 (Santa Clara County Super. Ct. Nos. JD025288; JD025289)
SANTA CLARA COUNTY DEPARTMENT OF FAMILY AND CHILDREN'S SERVICES, Plaintiff and Respondent, v. R.T. (Mother), Defendant and Appellant.	

In this dependency action, the mother of N.T. and X.T. seeks a remand to the juvenile court to remedy deficient inquiry and notice under the Indian Child Welfare Act of 1978 (ICWA or the Act) and state law implementing the Act. Mother argues respondent and the juvenile court failed to fulfill their duties of inquiry and notice based on the maternal grandmother's and great-grandmother's statements regarding their Indian ancestry, and mother's statement that her father "was part of a tribe." She argues that as a result, the juvenile court did not have a sufficient basis to determine whether the Act applied to her children at the time her parental rights were terminated. As we will explain, the statements of the maternal grandmother and great-grandmother do not require notice or further inquiry under ICWA or state law. Mother's statement regarding

her father does not require notice, but it does trigger a duty of further inquiry under state law, which was not undertaken here. Accordingly, we will remand the matter to allow the respondent and the juvenile court to remedy the violation.

I. BACKGROUND

The Santa Clara County Department of Family and Children's Services filed an amended juvenile dependency petition on behalf of nine-year-old N.T. and two-year-old X.T. alleging mother and father had engaged in repeated acts of domestic violence in the children's presence and mother had an untreated substance abuse problem jeopardizing the children's safety. (Welf. & Inst. Code, § 300, subds. (b), (c); undesignated statutory references are to this code.)

Three days before the initial hearing, the social worker spoke with the maternal grandmother about Native American ancestry. According to various documents in the record, the maternal grandmother related at that time that she "believe[d] her father may [have] been involved with a tribe but she knew no further information"; her mother "had reported Native American ancestry" but she (the great-grandmother) did not have any additional information; and her great-grandfather "was involved in an unknown tribe." The social worker later reached out to the maternal great-grandmother, who reported her grandfather "was 'Indian' but she had no further information." According to the court's minutes, neither parent was present at the initial hearing, and the court found that ICWA did not apply based on the social worker's report and voir dire of the paternal grandmother.[1]

The social worker met with mother a few weeks after the initial hearing, at which time mother related that her father "was part of a tribe"; mother did not know her biological paternal grandparents because her father was adopted; and she had no

[1] Father and the paternal grandmother have denied Native American ancestry, and the paternal grandfather is deceased. Mother's appeal challenges the court's ICWA finding only as it relates to her family.

information regarding the tribe. Mother told the social worker that her father was homeless and she had tried unsuccessfully to contact him. That same day mother filed an ICWA-020 Parental Notification of Indian Status form on which she checked the box stating "I may have Indian ancestry," and interlineated "maternal grandfather." She also appeared before the juvenile court at a hearing to appoint counsel, and according to the court's minutes, she was questioned by the court regarding ICWA.

Two days later, the social worker sent the parents and the Bureau of Indian Affairs (BIA) Sacramento Area Director an ICWA-030 Notice of Child Custody Proceeding for Indian Child for the jurisdiction/disposition hearing. The notice indicated that the children "may be eligible for membership in the following Indian tribes," but it did not specify a tribe and provided little to no information regarding the children's grandparents and great-grandparents. The BIA viewed the notice as a letter of inquiry to determine a tribal affiliation for the children and returned the notice to the Department due to insufficient information.

Neither parent was present at the jurisdiction/disposition hearing. The social worker's reports were admitted in evidence, and the allegations were found true after an uncontested hearing. The children were declared dependents of the juvenile court, and reunification services were ordered for mother and father. The court's order indicated that ICWA notice had been given as required by law, but did not state whether or not ICWA applied. Mother was present at the contested six-month review hearing, at which time reunification services were terminated and a hearing was set to select a permanent plan for the children. The order following that hearing stated that ICWA does not apply.

The Department recommended terminating parental rights so the children could be adopted by their paternal grandmother, with whom they had been living for over a year. At the start of the contested selection and implementation hearing, the Department asked the court to inquire whether mother had any new information regarding Native American heritage that had not already been provided to the court or social worker. Mother

reported having no new information, and the court made a finding that ICWA does not apply. The court denied a petition filed by mother requesting the children return to her care with family maintenance. Mother argued that the beneficial parent-child relationship exception applied and that it would be detrimental to the children to terminate her parental rights. The juvenile court found that mother did not meet her burden to establish grounds for the exception. It terminated parental rights and ordered adoption as the permanent placement plan. Mother timely appeals from that order, and from an order denying a section 388 petition.[2]

II. DISCUSSION

A. ICWA AND THE STANDARD OF REVIEW

The Indian Child Welfare Act of 1978 (25 U.S.C. § 1901 et seq.) was enacted "to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families" by assuring that Indian children who are removed from their families are placed in foster or adoptive homes reflecting the unique values of Indian culture. (*Id.*, § 1902.) Under ICWA, an Indian child's tribe has a right to intervene in or exercise jurisdiction over a dependency proceeding involving the Indian child. (*Id.*, §§ 1911(b)–(c), 1912(a).) To that end, the Act requires that appropriate tribes be notified of a state court dependency action which may result in termination of parental rights or a child's placement in foster care when the state court "know, or has reason to know" the proceeding involves an Indian child. (*Id.*, § 1912(a); § 224.3, subd. (a) [same].) The Act defines an Indian child as an unmarried person under age 18 who is either "a member of an Indian tribe" or "is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." (ICWA, § 1903(4).) An Indian tribe is defined as

[2] As mother does not claim error or seek relief as to the order denying her section 388 petition, any challenge to that denial is deemed abandoned. (See Cal. Rules of Court, rule 8.411.)

"any Indian tribe, band, nation, or other organized group or community of Indians recognized … by the Secretary [of the Interior]." (*Id.*, § 1903(8).)

The BIA promulgated regulations in 2016 to promote ICWA's uniform application in state courts. The regulations detail notice requirements when a state court "knows or has reason to know that the subject of an involuntary foster-care-placement or termination-of-parental rights proceeding is an Indian child." (25 C.F.R. § 23.111(a).) State courts must ask all participants in a dependency proceeding whether the participant "knows or has reason to know that the child is an Indian child," and must instruct the parties to inform the court should they later acquire reason to know the child is an Indian child. (25 C.F.R. § 23.107(a), (c).) The regulations specify six circumstances which give a state court "reason to know" a child is an Indian child: (1) the court is informed by a participant in the proceeding, court officer, Indian Tribe, Indian organization, or agency that the child is an Indian child; (2) the court is informed by a participant in the proceeding, court officer, Indian Tribe, Indian organization, or agency "that it has discovered information indicating that the child is an Indian child"; (3) the child gives the court reason to know he or she is an Indian child; (4) the court is informed that the child, the child's parents, or Indian custodian resides or is domiciled on a reservation or in an Alaska Native village; (5) the court is informed that the child is or has been a ward of a Tribal court; (6) the court is informed that either parent or the child possess an identification card indicating membership or citizenship in an Indian Tribe. (*Id.*, § 23.107(c)(1)–(6).) To conform to the federal regulations, the California Legislature amended several sections of the Welfare and Institutions Code effective January 1, 2019. (Assem. Bill No. 3176 (2017–2018 Reg. Sess.).) Among the amendments, the Legislature adopted the BIA's initial inquiry mandate and definition of "reason to know." (§ 224.2, subd. (c), (d).)

Our Legislature has also imposed on dependency courts and county welfare departments the "affirmative and continuing duty to inquire whether a child … is or may

be an Indian child." (§ 224.2, subd. (a).) California therefore additionally requires a dependency court and social worker to make "further inquiry" regarding the possible Indian status of a child if there is "reason to believe that an Indian child is involved in a dependency proceeding." (*Id.*, subd. (e).) The duty of further inquiry includes: interviewing the parents, Indian custodian, and extended family members to collect biographical data regarding the known names of the child's biological parents, grandparents, and great-grandparents, "including maiden, married, and former names or aliases, as well as their current and former addresses, birth dates, places of birth and death, tribal enrollment information of other direct lineal ancestors of the child, and any other identifying information, if known"; contacting the BIA and the State Department of Social Services to assist in identifying tribes in which the child or parent may be a member; and contacting tribes and persons who may reasonably be expected to have information regarding the child's tribal membership, citizenship status, or eligibility. (§§ 224.2, subd. (e)(1)–(3), 224.3, subd. (a)(5).)[3]

We review for substantial evidence the juvenile court's factual findings regarding the sufficiency of ICWA notice and whether proper and adequate inquiry has been conducted. (*In re Karla C.* (2003) 113 Cal.App.4th 166, 178–179; § 224.2, subd. (i)(2).) Where the facts are undisputed, we independently review whether ICWA's requirements have been satisfied. (*In re J.L.* (2017) 10 Cal.App.5th 913, 918; *In re Michael V.* (2016) 3 Cal.App.5th 225, 235, fn. 5.)

B. SCOPE OF APPEAL AND APPLICABLE LAW

Mother appeals from an order terminating parental rights under section 366.26. She contends the juvenile court did not have sufficient information to make an ICWA

[3] Formerly, the duty of inquiry in California was coextensive with the duty of notice—triggered by a "reason to know the child is an Indian child." (Former § 224.3, subds. (c)–(d).) California's "reason to believe" standard is new, and unlike the "reason to know" standard, it has not been further defined by our Legislature.

finding at the time it entered the order in December 2019 because the Department had failed to adequately investigate mother's Indian heritage or provide sufficient notice to the BIA. In her opening brief, mother cites former law requiring further inquiry and notice when the social worker "knows or has reason to know" an Indian child is involved in the dependency proceeding. (Former §§ 224.2, subd. (a) [notice], 224.3, subd. (c) [inquiry].)[4] She argues both duties were triggered by her mother's and grandmother's claimed Native American ancestry. She acknowledges both women were interviewed by the social worker, but argues those interviews did not satisfy the duty of further inquiry because the social worker did not gather biographical data regarding the children's parents, grandparents, and great-grandparents, as required by former section 224.3, subdivision (c) (revised and recast as section 224.2, subdivision (e)(1)). She argues notice of the jurisdiction/disposition hearing provided to the BIA was likewise deficient because it did not include any meaningful information, including the biographical data described here.

Responding to the argument that ancestry alone is insufficient to trigger either notice or further inquiry (citing *In re Austin J.* (2020) 47 Cal.App.5th 870 and *In re A.M.* (2020) 47 Cal.App.5th 303), mother argues for the first time in her reply brief that her statement to the social worker that her father " 'was part of a tribe' " and the maternal great-grandmother's statement that her own grandfather was " 'Indian' " gave a "reason to believe that an Indian child is involved in [the] proceeding" under section 224.2, subdivision (e). We will exercise our discretion to consider this argument although raised in the first instance in the reply brief, as respondent fully addressed in its brief whether

[4] Under former section 224.3, subdivision (b)(1), a nonexhaustive list of circumstances that "may provide reason to know the child is an Indian child," included "information suggesting the child is a member of a tribe or eligible for membership in a tribe or one or more of the child's biological parents, grandparents, or great-grandparents are or were a member of a tribe."

the statements are a basis to know or believe the children are Indian children. (*In re D.S.* (2020) 46 Cal.App.5th 1041, 1051, fn. 11.)

As a preliminary matter, we address mother's argument that we should review the inquiry and notice efforts undertaken by the Department in 2018 by applying California law as it existed at that time, before the 2019 amendments took effect. Citing *In re Isaiah W.* (2016) 1 Cal.5th 1 and *In re A.M.*, *supra*, 47 Cal.App.5th 303, respondent counters that the amended law regarding notice and inquiry applies to the appeal from the December 2019 order.

The California Supreme Court in *Isaiah W.* held that because ICWA imposes on juvenile courts a continuing duty to inquire whether a child is an Indian child, a parent who does not timely appeal an order which includes a finding of ICWA inapplicability may still challenge that finding as it applies to a later order terminating parental rights. (*In re Isaiah W.*, *supra*, 1 Cal.5th at p. 6.) In light of that continuing duty, the court reasoned that an order terminating parental rights is "necessarily premised on a *current* finding by the juvenile court" that ICWA notice is not required. (*Id.* at p. 10.) Applying *Isaiah W.*'s reasoning, the court in *In re A.M.* rejected the same argument made here that the 2018 statutes (in effect at the time social worker inquired and sent notice to the BIA) applied to an appeal taken from a 2019 order terminating parental rights. (*In re A.M.*, *supra*, 47 Cal.App.5th at pp. 313, 318–319.) The juvenile court's duty to determine whether children are Indian children is a *present* duty to be examined under the circumstances existing on the date the court terminates parental rights. (*Id.* at p. 320.) The *In re A.M.* court thus applied post-amendment law to review the ICWA finding underlying the 2019 order. (*Ibid.*) In the same vein, we will review the juvenile court's 2019 ICWA finding under post-amendment law. However, to address the merits of mother's arguments we must review the record in its entirety, including actions taken by the social worker earlier in the proceedings.

C. MOTHER'S MATERNAL ANCESTRY DOES NOT TRIGGER THE DUTY OF FURTHER INQUIRY OR NOTICE

The maternal grandmother told the social worker that her great-grandfather was "involved in an unknown tribe" and her father "may [have] been involved with a tribe." The maternal great-grandmother told the social worker that her grandfather was "Indian." Both women reported having no further information. Those interviews may establish a reason to know mother's children have Native American ancestry, but they do not establish a reason to know the children are members of a federally recognized Indian tribe or the biological children of a member of an Indian tribe. (*In re A.M.*, *supra*, 47 Cal.App.5th at p. 322 [a mother stating she "was told and believed that she may have Indian ancestry with the Blackfeet and Cherokee tribes" and listing her grandfather as having possible Native American ancestry did not provide a reason to know her children came within ICWA's definition of an Indian child]; *In re J.D.* (2010) 189 Cal.App.4th 118, 124–125 [information from a paternal grandmother about Native American ancestry with no tribe specified was too vague, attenuated, and speculative to trigger ICWA notice requirement]; *In re J.L.* (2017) 10 Cal.App.5th 913, 923 [ICWA notice not required based on a mother being told by family members she may have Indian ancestry].)

Reason to believe that a child is an Indian child is presumably a lower threshold than reason to know a child is an Indian child. (*In re Austin J.*, *supra*, 47 Cal.App.5th at p. 888.) But the arguably broader state standard still requires "a logical and reasonable relationship connecting facts with a resulting belief that a child is an Indian child"; information about a tribal connection that " 'is too vague, attenuated and speculative' " does not provide that nexus. (*Ibid*.) In *Austin J*., statements by a mother that she " 'may have Indian ancestry' " and was " 'told that [her] mother had Cherokee [ancestry],' " in addition to a statement by her aunt that she " 'may have had Cherokee heritage' " were insufficient to create a reason to believe her children were Indian children under ICWA.

(*Ibid.*; see also *In re A.M.*, *supra*, 47 Cal.App.5th at pp. 321–322 [Native American ancestry does not provide reason to believe children are Indian children]; *In re J.D.*, *supra*, 189 Cal.App.4th at p. 125 [same].) Similarly here, mother's Native American ancestry as described by her mother and grandmother is too vague and speculative to support a belief that her children come within ICWA's definition of Indian child. Neither woman claims a past or present membership in a federally recognized Indian tribe, and neither has information regarding a tribal affiliation. Their statements do not require notice or further inquiry.

D. MOTHER'S STATEMENT THAT HER FATHER "WAS PART OF A TRIBE" TRIGGERS FURTHER INQUIRY UNDER STATE LAW, AND REMAND IS WARRANTED

Mother's understanding of her father's tribal affiliation does not provide a reason to know the children are Indian children under ICWA. Her understanding, without more, does not impart that she or the children are members of a federally recognized Indian tribe. Arguing that mother's report of her father's tribal affiliation also does not provide a reason to believe the children are Indian children under ICWA, respondent distinguishes *In re A.M.*, where a mother's report of Native American ancestry through her maternal grandfather with the Blackfeet and Cherokee tribes provided a "reason to believe" the children came within ICWA's definition of an Indian child. (*In re A.M.*, *supra*, 47 Cal.App.5th at p. 322.) We recognize that mother has not identified her father's tribal affiliation. But her representation to the social worker that her father "was part of a tribe" describes more than mere Native American ancestry. It suggests that the children's living maternal grandfather may be or have been a member of a tribe, and thus provides a logical and reasonable basis to support a belief that the children may come within ICWA's definition of an Indian child. It thus triggers the duty of further inquiry under California standards. (Welf. & Inst. Code, § 224.2, subd. (e).)

Respondent does not contend, nor does the record affirmatively show, that the social worker inquired of all known extended family members regarding the children's maternal grandfather, as required under section 224.2, subdivision (e). The social worker's documented ICWA inquiries do not identify the children's extended family members, which by definition include any adult who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent. (25 U.S.C. § 1903(2); Cal. Rules of Court, rule 5.481(a)(4)(A).) Indeed, according to the jurisdiction/disposition report, the social worker spoke with mother's sister-in-law" who described how she and her husband had intervened in a domestic dispute giving rise to the failure to protect and emotional damage alleged in the juvenile dependency petition. The social worker did not clarify whether the sister-in-law is father's sister or the wife of a maternal brother, who should have been interviewed about the maternal grandfather. Nor does the record show whether the maternal grandmother was asked about the maternal grandfather. The absence of even known information on the ICWA-030 notice does not assure us that an adequate inquiry was undertaken regarding the maternal grandfather.

We note that further inquiry is no longer simultaneous with notice under section 224.3. (See fn. 3, *ante*.) In making further inquiry on remand, close attention must be paid to section 224.2, subdivision (e), and the California Rules of Court, rule 5.481. It is ultimately for the juvenile court to determine whether appropriate inquiry has been undertaken with the due diligence specified in those provisions.

III. DISPOSITION

The December 10, 2019 order terminating parental rights is conditionally reversed. The matter is remanded to the juvenile court for the inquiry required by Welfare and Institutions Code section 224.2, subdivision (e), and for any further proceedings resulting therefrom. The juvenile court must determine whether further inquiry has been conducted (§ 244.2, subd. (i)(2)), and must make a finding under California Rules of

Court, rule 5.481(b)(3)(A)–(C). If the juvenile court finds that ICWA does not apply, the December 10, 2019 order shall be reinstated. If the court finds N.T. and X.T. are Indian children, it shall conduct a new duly noticed section 366.26 hearing and associated proceedings in compliance with ICWA and related California law

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Grover, J.

WE CONCUR:

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Greenwood, P. J.

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Danner, J.